In *Re Potter's Trust*[2] there was a gift of one-fourth of the testator's residuary estate to the family of his sister Mary Lamb, with this proviso: "And in case of the death of any of my said nephews and nieces, then I direct that such issue shall take the share that his, her, or their deceased parent would have taken if living." In his judgment Malins V.C. said: —

"Now here there can be no doubt that the testator's intention was to give to his nephews and nieces, the children of Mary Lamb, and also to substitute the children for the parent with respect to those nephews and nieces who died at some period after his own death, but before the period of distribution. Suppose that some were actually dead at the time of the testator's death, but the fact was unknown to him, and that there were others who died after him; is there any probability that he intended to shew greater favour to the latter than to the former? Take the common case of a gift by a parent to his children of definite parts of his whole property, followed by the words: 'But if any of them shall die then I give it to their issue, the issue of those who are dead to take the shares which their parents would have taken if living.' Can it be supposed that he had less affection for those grandchildren whose parents predeceased him, but whose death he did not know of, than for those whose parents survived him? There is no ground for such a supposition. If the intention is to exclude grandchildren whose parents are dead at any particular period, there ought to be something to shew it; there is nothing of the kind in this will."

After referring to various authorities the judgment concluded as follows: —

"The result, then, of the authorities is, that a child of a nephew or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent. Desiring, as I now do, to put the law on a rational footing, in my opinion there ought not to be any distinction between a gift to persons as a class and a gift to them as individuals; and, therefore, where the testator makes a bequest, as in the present case, to nephews and nieces, with a substitutionary gift over to the issue of any who shall die, the issue should take what the parent would have taken if living at the death of the testator, such being the testator's positive intention. The result is the same whether the parent dies before the date of the will, or after that time and before the testator, unless the will shews a contrary intention. The children of all the nephews and nieces who died in the testator's lifetime will therefore take what their respective parents would have taken if living at his death."

For the same reasons as set out in the above cases I am of opinion that the learned trial judge was right in the view he took and this appeal should be dismissed.

There remains only the question whether the appellants should personally bear the costs of the application in the court below. In my view it is only fair that all costs of the parties should be taxed as between solicitor and client and paid out of the funds of the testator's estate. This is the general rule unless there are special reasons for depriving the trustees of their costs. It would appear that they had, in fact, been of the same opinion as the court until their solicitors advised them, as a precautionary measure for protecting themselves, to apply to the court for directions. It is true, as the learned trial judge said, that the appellants had waited for 20 years before seeking an interpretation of the will, but they are laymen who had in fact been taking legal advice at all times and the delay is not strictly speaking their own fault. The order of the court below will accordingly be varied only in respect of the order as to costs.

Ali and **Ong Hock Sim F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Lim Cheng Ean & Co.*

HONGKONG & SHANGHAI BANKING CORPORATION, IPOH v. RENT TRIBUNAL FOR ULU KINTA & ORS.

[F.C. (Ong C.J. (Malaya,) Ali and Ong Hock Sim F.JJ.)

October 22, 1971]

[Ipoh — Federal Court Civil Appeal No. 61 of 1971]

Administrative Law — Certiorari — Application to quash order of Rent Tribunal — Findings of fact where there is evidence to support conclusions — Control of Rent Act, 1966, s. 23.

Landlord and Tenant — Lease — Expiration of — Whether new monthly tenancy created — Application to decontrol premises — Refusal of Rent Tribunal to grant certificate of decontrol — Right of appeal — Control of Rent Act, 1966, ss. 12, 13 and 23.

Practice and Procedure — Jurisdiction — Notice of appeal from decision of Rent Tribunal to Appeal Board on record — Whether High Court can entertain application for certiorari simultaneously.

This was an appeal from the decision of Chang Min Tat J. who had dismissed the application of the appellants for an order of *certiorari* as he was of opinion that on the evidence before the Rent Tribunal, it was justified in finding as a fact that a monthly tenancy had superseded after the expiry of the lease.

Held, dismissing the appeal: the Rent Tribunal was amply justified in finding as a fact that there was a consensual monthly tenancy accepted by both parties, and therefore there was no reason to disturb the Rent Tribunal's decision.

Cases referred to:-

(1) *Edwards* v. *Bairstow* [1955] 3 W.L.R. 410, 423.

(2) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118 at p. 121.

(3) *Badat bin Drani* v. *Tan Kheat* [1953] M.L.J. 67.

(4) *Melayu Raya Press Ltd.* v. *Blythe* [1951] M.L.J. 89.

FEDERAL COURT.

J. J. Puthucheary for the appellants.

M. Sivalingam for the first respondent.

R. R. Chelliah for the third respondent.

Ong C.J. (Malaya): The Hongkong and Shanghai Banking Corporation are the owners and landlords of Hongkong Bank Chambers in Ipoh, of which the first and second floors had been let to Gibb & Co., a firm of advocates and solicitors for many years under successive leases. The last lease was for 3 years, expiring on March 31, 1968. An option therein for renewal was not exercised by the tenants.

The Control of Rent Act 1966 came into force on January 1, 1967. Section 23 provides for decontrol of rent-controlled premises, as follows: —

"(1) In either of the following events, namely —

(a) where the tenancy of any controlled premises, being a tenancy for a fixed period and other than a monthly tenancy, has been determined either by effluxion of time or by any other means whatsoever; or

(b) where the tenant of any controlled premises for any reason whatsoever surrenders his tenancy either on his own volition or is required by law so to do,

the landlord thereof may apply to the Tribunal requiring the latter to issue a certificate stating either or both of the facts referred to in this sub-section, and upon the issue of such certificate a copy thereof shall be served on the tenant.

(2) Upon the service on the tenant of a copy of such certificate, the premises concerned shall forthwith cease to be controlled premises and *any person* holding on after such cessation shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under this Act but for such cessation."

On July 31, 1968, 4 months after expiry of the lease to Gibb & Co., the bank applied to the Rent Tribunal for decontrol of the premises citing the then partners of the firm as respondents. At the first hearing on September 17, 1968 the bank was represented by Mr. C. Navaratnam, an assistant in Gibb & Co., who were also the bank's solicitors. No one appeared on behalf of the respondents, but Mr. Navaratnam informed the tribunal that the application was made "with the consent of the respondents". Further hearing was continued on September 27, 1968 — again *ex parte* in the absence of the respondents — but not concluded. Several adjournments followed, upon applications by the bank's solicitors for postponement and the application did not come up for final disposal until March 27, 1970. By then the partnership in the law firm had been dissolved and Mr. Balasingam became sole proprietor of Gibb & Co. as from March 10, 1970. At this stage he stood out in opposition to the application, on the ground that during the two years which had elapsed since the expiry of the lease, Gibb & Co. had been monthly tenants accepted by the bank as such, so that neither paragraph (a) nor (b) of section 23(1) applied and the Rent Tribunal was debarred from issuing any certificate of decontrol. On April 8, 1970 the bank's application was dismissed.

The Rent Tribunal's grounds of decision may be summarised in its own words as follows: —

"The Board found as a fact:

(1) That after the expiration of the lease the landlords accepted rent without reserve or qualification.

(2) That the landlords never intended to repossess the premises or to sever the relationship of landlord and tenant.

(3) That acceptance of such rent was with a view to creating a new tenancy.

(4) That the sole purpose of this application was to use section 23(1) of the Control of Rent Act, 1966 as a device to bargain for an increase in rent.

Having come to these findings the board came to the conclusion that in fact and in law a new month to month tenancy had been created and accordingly dismissed the application."

The bank then applied to the High Court, by way of *certiorari*, for the tribunal's order to be quashed. Relief was sought on the following grounds: —

"(i) That the review of the orders of the tribunal by the Appeal Board is confined to matters specified in section 13 of the Control of Rent Act, 1966 and that the Act does not provide for an appeal to the Appeal Board by the aggrieved applicants in respect of the issue of a certificate of cessation of control.

(ii) That the Rent Tribunal in dismissing the application for decontrol exceeded its powers in exercising a discretion which it did not have when dealing with an application for decontrol under the Control of Rent Act, 1966.

(iii) That the applicants have proved the requirements of section 23(1) (a) and it was mandatory under section 23 of the Control of Rent Act, 1966 to issue the certificate of decontrol of the applicants.

(iv) That the Rent Tribunal erred in law in finding that where a tenancy for a term of years of a controlled premises had expired the acceptance of rent by the landlord before the premises is decontrolled creates a new tenancy."

Chang Min Tat J. dismissed the application with costs, being of opinion that, on the evidence before the tribunal, it was justified in finding as a fact that a monthly tenancy had supervened after the expiry of the lease, with the result that resort to section 23(1) was not open to the landlord. The learned judge went on to state that, in his view, the tribunal had neither acted in excess or want of jurisdiction nor was there any error of law on the face of the record.

Against that decision the bank now appeals on a number of grounds, which, in broad terms, are to the effect that "having regard to the evidence, the finding of fact by the learned judge cannot be justified".

With respect it seems to me that the appellants have been under a misconception as to the relief which they were seeking. *Certiorari* would lie where the Rent Tribunal had acted without or in excess of jurisdiction, or again where there was an error of law. Findings or conclusions of fact alleged to be erroneous are not open to correction by way of *certiorari* — save that, where there are no facts to support a conclusion presumably based on evidence, then the error would be an error of law. As Lord Radcliffe explained in *Edwards* v. *Bairstow*[1]: —

"..... it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances ..... the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law."

The appellants' case, in a nutshell, is that once they proved that there was a lease for a term of years and that such lease had expired the landlords are entitled as of right to a certificate of decontrol by virtue of paragraph (a) of section 23(1). In support of this contention, counsel for the bank cited what I had said recently in *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.*[2] as follows: —

"As I understand it the section provides that, whenever the tenancy of any controlled premises comes to an end — whether upon expiry or other determination of a lease for a term of years, or, in case of monthly tenancies, upon surrender thereof, voluntary or otherwise — the landlord is entitled, upon application to the rent tribunal at any time, to a certificate of decontrol of the controlled premises. The tribunal, of course, is left no discretion in the matter, since it is *required* to issue such certificate upon proof of the event described in either paragraphs (a) or (b)."

It is not disputed by counsel for Mr. Balasingam, respondent in this appeal, that the above excerpt is a

correct exposition of the provisions of section 23. Indeed, it is common ground that where the landlord's application falls squarely within paragraph (a) or (b), then in either case the Rent Tribunal is left no discretion but to issue the required certificate.

The crucial issue raised before the Rent Tribunal in the instant case, however, was whether or not a consensual tenancy from month to month did come into being after the expiry of the lease. On the documentary, as well as oral, evidence produced the tribunal found as a fact that a tenancy of this type did in fact supervene. As Mr. Wicks, the bank's property manager, said in evidence: "In accepting the rent it was intended to accept Gibb & Co. as tenant." In the result Mr. Balasingam claimed that paragraph (a) ceased to count, nor could paragraph (b), since there was no voluntary surrender by the tenant nor was he required by law to do so. On its finding of fact the tribunal was of course bound to dismiss the bank's application.

In what manner then was the judge wrong in refusing to disturb the tribunal's decision? He had perused the evidence and affirmed the tribunal's decision. Upon further appeal to this court, should we reverse his decision when there have been concurrent findings of fact both by the Rent Tribunal and by the High Court? In my view, the answer must be in the negative — not simply because it has been a time-honoured practice to refrain from disturbing concurrent findings of fact, but also because, on the evidence it is clear that the bank agreed willingly to let Gibb & Co. hold over as tenants; that Gibb & Co. had at all times the intention of continuing as tenants and it was admitted by the bank's own witnesses that the monthly rents were paid and accepted pending negotiations to conclude an agreement for a new lease. In these circumstances my view is that the Rent Tribunal was amply justified in finding as a fact that there was a consensual monthly tenancy accepted by both parties, which was intended to enure till the monthly tenancy should in due course be supplanted by a lease for a term of years. There is not an iota of evidence that the landlord and tenant relationship was an imposition by the law on reluctant parties.

The appeal is accordingly dismissed with costs.

Ali F.J.: I agree with the learned Chief Justice that this appeal be dismissed but, in view of certain aspects of the arguments, I would wish to say a few words.

At the hearing of this appeal Mr. Chelliah for the respondent took the point that *certiorari* would not lie in this case because in terms of the Act the appellants have a right of appeal to the Appeal Board under section 15(1). Mr. Puthucheary for the appellants, on the other hand, has maintained that *certiorari* would lie because his clients have no right of appeal The legal view which both counsel seem agreed upon is that *certiorari* would lie only if there was no right of appeal. The order of *certiorari* is a means by which the High Court can exercise control over inferior courts and other persons and bodies of persons having legal authority to determine questions affecting the rights of subjects and having the *duty* to act judicially. See *Halsbury's* Laws of England, 3rd Edition, Vol. 11, page 53. On page 55 the following words of the subheading would appear significant:

"*Certiorari* and prohibition lie only in respect of judicial acts."

For the present purpose, I do not wish to examine the recent trends in England on this aspect of the law but it does seem clear to me that the relevant question in the instant case is not whether the appellants have or have not a right of appeal but whether the Rent Tribunal was performing judicial or quasi-judicial function. *Certiorari* would lie if it was and would not lie if it was not. It follows, therefore, that the legal view of both counsel seems erroneous. Whether or not the Rent Tribunal in this case was performing judicial or quasi-judicial function was not discussed either here or below but I am more inclined to the view that it was. The Rent Tribunal is constituted under section 12 of the Act and in terms of this provision there is little doubt that it has the duty to act judicially in respect of any matter brought before it.

The next question, of course, is whether an order of *certiorari* ought to have been granted by the High Court. The learned Chief Justice has dealt with this question agreeing, as he did, with the learned trial judge that it could not be granted. I also agree.

Ong Hock Sim F.J.: The normal rule is that *certiorari* will not lie where there is an alternative remedy. (See *Badat bin Drani* v. *Tan Kheat*[1] where the applicant had failed to avail himself of the remedy of appealing to the High Court: and *Melayu Raya Press Limited* v. *Blythe*[2] where the application was refused as the applicants had not exhausted their right of appeal.) It would appear in this instance the appellants are on an exploratory mission and seek a ruling from the High Court and this court whether a right of appeal exists from a decision under section 23 of the Control of Rent Act, 1966. The learned judge, while dismissing the application for an order of *certiorari* to quash the proceedings and order of the Rent Tribunal with reference to the appellants' application for a certificate of cessation of control pursuant to section 23(1)(a), accepted the arguments of Mr. Puthucheary, counsel for the appellants, that no appeal is given by statute to a decision of the Rent Tribunal under section 23(1). With respect, I disagree. In my view, in terms of the Act, the appellants' right of appeal is in no way restricted to decisions made in exercise of the tribunal's powers under section 13 but extends to all decisions whatsoever. It is admitted that the notice of appeal to the Appeal Board from the decision of the Rent Tribunal filed by the appellants is still on the record. For this reason, I would dismiss this appeal.

While agreeing that *certiorari* would lie, the learned judge however dismissed the application as he concluded that the chairman of the tribunal was not without reason for his findings of fact. I am in agreement with the learned Chief Justice that *certiorari* will not lie against findings of fact where there is evidence to support the conclusions arrived at but only to correct errors of law resulting in failure of justice. As

is stated in *Halsbury's* Laws of England, 3rd Edn. Vol. 11, paragraph 108 at page 53:

"108. Many statutes contain provisions substituting for the orders of *mandamus*, prohibition and *certiorari* a different procedure for bringing before the court matters or questions arising under the statute. A common form is a provision that, if any person, aggrieved by an order made under the Act, desires to question the validity thereof on the ground that it is not within the powers of the Act or that any requirement of the Act has not been complied with, he may make an application to the Court, and the Court may, if satisfied that the order is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by any requirement of the Act not having been complied with, quash the order; but that save as aforesaid the order shall not be questioned by prohibition or *certiorari* or in any legal proceedings whatsoever."

Further at page 63 appears this passage —

"*Certiorari* will not be granted to quash the decision of an inferior tribunal within its jurisdiction on the ground that the decision is wrong in matters of fact, and the Court will not hear evidence impeaching the decision on the facts." [See *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128 P.C.; *R.* v. *Bolton* (1841), 1 Q.B. 66.] "It is not now necessary for magistrates to set out the evidence in a conviction before them; but if they choose to do so, or if an inferior tribunal elects, or is required by the legislation constituting it, to set out the evidence adduced before it in its order, and thus make it a "speaking order", still the superior court will not on *certiorari* inquire whether the inferior tribunal has come to a right decision on the facts. Where the evidence is set out in the conviction or order, and the superior court is of opinion that there was no evidence proper to be considered by the magistrates in support of some point material to the conviction or order, *certiorari* will be granted. If there is any evidence, the court will not examine whether the right conclusion has been drawn from it." [See *R.* v. *Birmingham Compensation Appeal Tribunal of Ministry of Labour and National Service, Ex parte Road Haulage Executive*, [1952] 2 All E.R. 100, n.]

I agree therefore with the learned Chief Justice that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Lim Cheng Ean & Co.; K. R. Chelliah Bros.*

ONG LOCK MUI v. DEPUTY PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) October 28, 1971]

[Johore Bahru — Criminal Appeal No. 49 of 1969.]

Income Tax — Appeal — Assessment returns — Notice of — Failure to furnish within specified period — Income Tax Ordinance, 1947, ss. 90(1) & (2).

Interpretation — Construction of statutes — Repeal — Effect of saving clauses in later statute — Interpretation Act, 1967, s. 29 — Income Tax Act, 1967, ss. 1(3), 155, 156, Sch. 8 and 9 para. 3(1).

The appellant was charged and convicted of two offences under section 90(1), punishable under section 90(2), of the Income Tax Ordinance, 1947, for non-compliance of a notice requesting him to furnish his income returns for the years of assessment 1959 and 1966, within 40 days of its issue.

The appeal was on points of law. The appellant contended that on the day the notices were issued to him, the Ordinance and all its subsidiary legislation had been "wholly repealed and revoked". Therefore, the conviction on the charges could not be in respect of offences known to law, for by reason of the first limb of section 29 of the Interpretation Act, 1967, the repeal had the effect of obliterating the Ordinance and its subsidiary legislation. However, the appellant did not dispute that the Ordinance and its subsidiary legislation were still in force and that the Comptroller-General could still ask for returns under section 61A of the Ordinance; but he maintained that after 1968, when the Income Tax Act, 1967 came into force, the Comptroller-General had to apply the provisions of section 77 of that Act.

Held, dismissing the appeal: (1) the rule that the effect of repealing a legislation is to obliterate it completely, applies only where there are no express saving provisions in the repealing legislation;

(2) section 1(3) of the Income Tax Act, 1967, provides that the Act shall have effect for the year of assessment 1968 and subsequent years of assessment. The provisions of section 156 and paragraph 3(1) of Schedule 9 to the Act expressly save the Ordinance and its subsidiary legislation which are still in force for matters which relate to the years of assessment from 1948 to 1967.

Case referred to:-

(1) *In re R.* [1906] 1 Ch. 730.

INCOME TAX APPEAL.

Appellant in person.

Nizar bin Idris (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The appellant was charged in the magistrate's court at Johore Bahru with two offences under section 90(1) of the Income Tax Ordinance, 1947 of failing without reasonable cause to furnish his income returns in respect of the years of assessment 1959 and 1966 within the period of 40 days as required by notices issued to him, and punishable under section 90(2) of the Income Tax Ordinance, 1947 (which I shall refer to as the Ordinance). He claimed trial. At the conclusion of the trial he was convicted and fined $100 on each charge.

In dealing with the appeal, I need only confine myself to the arguments of Mr. Ong, who is a senior member of the Johore Bar. In the lower court he defended the case himself and here also he has chosen to argue the appeal himself. The appeal is on points of law. The facts are not in dispute. They clearly show that Mr. Ong did not furnish the returns within the period required by the notices which were issued to him on 5th February, 1968 under section 61A of the Ordinance.

Mr. Ong's arguments are to the following effect. As on the day the notices were issued to him the Ordinance and all its subsidiary legislation had been "wholly repealed and revoked" his conviction on the charges against him could not be in respect of offences known to law; by reason of the first limb of section 29 of the Interpretation Act, 1967 the repeal had the effect of obliterating the Ordinance and its subsidiary legislation. At the same time, he says, he does not dispute that the Ordinance and its subsidiary legislation are still in force and that the Comptroller-General of Income Tax can still ask for statements under section 61A of the Ordinance, but he maintains that after 1968 when the Income Tax Act, 1967 (which I shall refer to as the Act) came into force, the Comp-